CYNSAN DEVELOPMENT SDN. BHD.

v.

MAJUNIS TUMPI & ORS.

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[SUIT NO: S-23-20 OF 1996]
25 FEBRUARY 1997

CONTRACT: *Agreement to extract timber - Breach - Performance - Assignment - Assignment of benefit of license to third party - Breach - Damages/specific performance - Construction of terms of contract*

CONTRACT: *IIlegality - Assignment of forest licence - Assignment of rights in a licence for timber extraction - Contravention of law - Terms - Condition of licence - Void contract - Non-compliance with statute - Section 24(6) of Forest Enactment 1968*

On 24 June 1993, the defendants secured an approval from the Sabah State Government for a piece of timber land ('the Timber Land'). Before a timber licence was issued to the defendants, the plaintiffs and the defendants executed a Timber Sales Agreement on 25 March 1994 ('the Timber Sales Agreement') wherein the defendants agreed to sell timber on the Timber Land to the plaintiffs. In consideration thereof, some payments were made by the plaintiffs to the defendants. A Power of Attorney was also given by the defendants to the plaintiffs on the same day. A Timber Extraction Agreement was also executed on the same day between the defendants and one Inwill Resources Sdn. Bhd. ('Inwill'). One Mr. Han Ah Wah is a common director of the plaintiffs and Inwill.

On 22 April 1996, a timber licence was issued in favour of the defendants pursuant to the Forest Enactment 1968 authorising the licensee to extract forest produce, namely, round logs from the Timber Land. The license also required the licensee to make certain payments, fulfill certain conditions and imposed obligations on the licensee to undertake certain community projects for the Forestry Department Sabah.

The plaintiffs then brought the present action against the defendants claiming, *inter alia,* specific performance by the defendants of the Timber Sales Agreement, an injunction to restrain the defendants, their attorney or servant or agent from committing a breach of the Timber Sales Agreement in selling the timber extracted from the Timber Land to any other individual or company, damages and costs.

The defendants in their defence claimed, *inter alia*, that there was a breach of the Agreements by the plaintiffs and illegality of the transaction.

The primary issue before the Court was whether the transaction between the plaintiffs and the defendants was illegal in view of the provisions of s. 24(6) of the Forest Enactment 1968. The section provides, *inter alia*, that a licence shall be personal to the holder and shall not be transferable in any manner whatsoever.

Held:

[1] Before determining the legal status of the transaction between the plaintiffs and the defendants, the contents of the Agreements and the Power of Attorney had to be scrutinized carefully to ascertain the real effects on the parties.

[2] The actual date of issuance of a timber licence is irrelevant in determining the legal status of such a transaction. The crucial time to determine the legal position of the parties was at the time of conclusion of the Agreements and Power of Attorney and not at the time of commencement of action. Hence, it was not material that a power of attorney granted earlier had already been revoked when an action was commenced. If there had been any illegality, that illegality would have the effect of making a transaction void *ab initio*. Such illegality could not be rectified subsequently when such illegality relates to the formation of the contract.

[3] Upon the execution of the Agreements and the Power of Attorney by the defendants, the defendants had nothing more to do with the timber licence but to merely sit back to collect the balance of their dues as agreed for parting with their rights. The defendants had parted with all their interest in the timber licence for financial consideration. That should make the arrangement illegal being in contravention of s. 24(6) of the Forest Enactment 1968 and any claim based thereon cannot succeed by reason of the illegality. The plaintiff's claim would be unenforceable when they had either to find their claim on an illegal transaction or to plead its illegality in order to support their claim.

[4] The allocation of the various activities in the Timber Land to several parties (namely, the Timber Sales Agreement was signed with the plaintiffs whereas the Timber Extraction Agreement was signed with Inwill) made no difference where the cumulative effect of the documents was the parting away of the interests or rights of a licensee under a timber licence issued.

[5] It was not a precondition that the powers in the Power of Attorney had to be exercised before the issue of illegality could arise.

[Plaintiff's action dismissed.]

Cases referred to:

Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd. [1971] 2 MLJ 161 ***(refd)***
Sundang Timber Co. Sdn. Bhd. v. Kinabatangan Development Co. Sdn. Bhd. [1977] 2 MLJ 200 ***(refd)***
Nam Seng Co. v. Wing Yew (Tawau) Co. Sdn. Bhd. [1978] 2 MLJ 198 ***(refd)***
Kuju Collieries v. Jharkhand Mines [1974] AIR SC 1892 ***(refd)***
Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. [1980] 1 MLJ 21 ***(refd)***
Bowmakers Ltd. v. Barnet Instruments Ltd. [1944] 2 All ER 579 ***(refd)***
Mistry Amar Singh v. Kulubya [1963] 3 All ER 499 ***(refd)***
Tinsley v. Milligan [1993] 3 All ER 65 ***(refd)***
Sajan Singh v. Sardara Ali [1960] 1 All ER 269 PC ***(refd)***
Soh Eng Keng v. Lim Chin Wah [1979] 2 MLJ 91 ***(refd)***
Ahmad bin Udoh & Anor. v. Ng Aik Chong [1970] 1 MLJ 82 ***(refd)***

Legislation referred to:
Contracts Act 150, s. 66
Forests Enactment 1968, s. 24(1), (6)

Other sources referred to:
Contracts, Chitty, Vol. 1, 26 Edn., paras. 1135-36

For the plaintiff - Francis Wong; M/s. Peter Lo & Co.
For the defendants - Seibing Gunting; M/s. Donald Mojuntin & Seibing Gunting

JUDGMENT

Richard Malanjum J:

The Action

In this action the plaintiffs are seeking for the following orders: (verbatim),

(a) Specific performance by the defendants of the said agreement dated 25 March 1994 in that the defendants are to extract all the merchantable timber standing on the said Land and deliver the same to the plaintiffs;

(b) For an injunction to restrain the defendants, their attorney or servant or agent from committing a breach of the said agreement dated 25 March 1994 in selling the timber extracted from the said Land to any other individual or company, save to the plaintiffs;

(c) Damages;

(d) Costs; and

(e) Such other relief as the Court deems fit.

But in his final submissions learned Counsel for the plaintiffs asked for (a) and (b) with (c) as the alternative and (d) thereof.

For the defendants, their defence to the claim may be summarised as follows:

(i) breach of the agreement and failure of the plaintiffs to perform satisfactorily the obligations under the Power of Attorney granted to them;

(ii) that the agreement and the Power of Attorney constituted an assignment of the rights of the defendants in contravention of the provisions of the Forests Enactment 1968 ('the said Enactment') and/or the Contracts Act 1950 and thus illegal;

(iii) failure of the plaintiffs to comply with the requirement of the State Government, namely, the construction of the Forestry Community Project in the area of the timber land; and

(iv) failure of the plaintiffs to fulfill their other promises besides those stated in the agreement.

However, in his closing submissions learned Counsel for the defendants emphasised on three matters only, namely, on illegality, failure to fulfil additional promises and the non-enforceability of a void contract.

The Agreed Facts

Learned Counsel for both parties at the commencement of the hearing indicated that they had agreed to certain facts. Hence, towards the end of the proceeding the learned Counsel for the plaintiffs submitted a document purporting to be the Agreed Facts and which I marked "A". The contents are herein reproduced in toto:

1. The plaintiffs and the defendants executed a Timber Sales Agreement dated 25 March 1994 wherein the defendants agreed to sell all the merchantable timber on the land as stated in the said agreement to the plaintiffs.

2. There was a Power of Attorney dated 25 March 1994 by the defendants to the plaintiffs.

3. There was a Timber Extraction Agreement between the defendant and Inwill Resources Sdn. Bhd.

Other Relevant Undisputed Facts

From the evidence adduced there were no dispute on the following:

(i) that PW2, Mr. Han Ah Wah is a common director of the plaintiffs and another company, Inwill Resources Sdn. Bhd.;

(ii) that the three documents above-mentioned were all dated 25 March 1994;

(iii) that a timber licence was yet to be issued when the plaintiffs entered into the Timber Sales Agreement with the defendants;

(iv) that the Power of Attorney was also granted by the defendants to the plaintiffs before the issuance of a timber licence to the former;

(v) that some payments were made by the plaintiffs to the defendants upon the execution of the Timber Sales Agreement although the amounts are in dispute;

(vi) that at the time of executing the Timber Sales Agreement and the Power of Attorney the defendants had only secured an approval *vide* MNR. 401/49/7/2/129 dated 24 June 1993 from the Sabah State Government for their application of a timber land measuring a total area of 1,700 acres more or less at Kg. Balisuk, in the District of Ranau. On the issuance of the timber licence the total area given was 654.40 hectares, at the locality of Sungei Liwagu, Ranau ('the said timber land');

(vii) that when the timber licence in the form of licence to take forest produce - Form I dated 22 April 1996 was issued ('the said timber licence'), it was valid from 22 April 1996 to 19 January 1997;

(viii) that the said timber licence was an ordinary licence issued under the said Enactment (s. 24) and contained provisions, *inter alia,*

(a) the payment of deposit by the licensees (i.e. the defendants) to the Director of Forestry Department Sabah in the sum of RM30,000 as well as a letter of guarantee to be furnished as security for the fulfilment of the conditions therein;

(b) the payment of royalty, fees and other charges;

(c) the employment of Bumiputra;

(d) the obligation of the licensees towards safe-guarding the environment in the said timber land; and

(e) the obligation of the licensees to undertake community forestry development project as stipulated by the Director of Forestry Department Sabah; and

(ix) that the said timber licence authorised the licensees to take, within the area specified therein and subject to the conditions stipulated therein and the provisions of the said Enactment and the Forest Rules 1969, a forest produce, namely, round logs only. Obviously, therefore in considering the provisions of the timber licence the provisions of the said Enactment should be taken into account.

The Issues

Based on the evidence adduced and the contentions of learned Counsel for the parties the primary issue to be determined is whether the transaction between the plaintiffs and the defendants was illegal. If the answer to the foregoing question is in the negative, the next question is whether there was a breach of the agreement by the plaintiffs and thus justified the conduct of the defendants towards the Timber Sales Agreement. In the event that my finding to this second question is favourable to the plaintiffs, then the final question is: what relief should the plaintiffs get? Of course, the last question demands that the plaintiffs must first establish their case on the balance of probabilities.

The Law, Evidence, Contentions and Findings on the Issues

(i) The Transaction and its Legality

(a) The Law

Section 24(6) of the said Enactment reads:

> A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever, and shall cease to be valid on the death of such holder or if such holder is declared to be insolvent under the provisions of any written law.

This provision had been a subject matter of several legal actions of which some went up to the highest Court of this country. And the decisions had been consistent.

The earliest of those cases is the case of *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161. Briefly the facts of the case are as follows:

Pursuant to the then Forest Rules 1954 the Forest Officer, Sabah issued a licence on 14 September 1995 ('the licence') to Beaufort Timber Extraction Co-operative Society ('the Co-operative Society') to extract timber at Lumadan in an area of about 3,370 acres ('the concession').

By a power of attorney dated 3 August 1965 the Co-operative Society appointed the Jesselton Development Limited as their attorneys in respect of the rights under the licence. But it should be noted that when the power of attorney was granted the licence was yet to be issued.

In turn Jesselton Development Limited pursuant to a deed dated 13 September 1966 made Southern Estate Sdn. Bhd. the respondents, their substitute as attorneys for the Co-operative Society. Such step was permitted by their power of attorney.

The respondents exercised the rights under the licence until 1968 when they failed to pay the royalty and other charges thereby resulting in the Forestry Department seizing the logs in the log pond at Weston and also the logs at the jungle camp of the respondents.

Then on 12 December 1968 Lo Su Tsoon Timber Depot, the appellants, entered into an agreement with the respondents setting down the respective rights and obligations of the parties therein. Amongst them was the obligation of the appellants to pay to the Co-operative Society the sum of RM175 per acre for an area of 2,500 acres of the concession where timber were yet to be extracted and RM75 to Jesselton Development Company for the same reason. Such payments were to be made yearly in the total sum of RM625,000. And it was made clear that the appellants were to pay on behalf of the respondents. To implement the terms of the agreement the respondents granted a power of attorney dated 23 December 1968 to the appellants. The respondents did so in the exercise of the powers contained in the first power of attorney and the deed dated 13 September 1966.

The power of attorney given to the appellants provided several powers to them and made reference to the agreement of 12 December 1968.

Soon after the execution of the agreement of 12 December 1968 the appellants gave the respondents four post-dated cheques. The first one was honoured while the rest were dishonoured. Notice of dishonoured was given accordingly. The appellants then gave two cheques of certain amount which were honoured. But there was still a balance due. The respondents therefore sued the appellants for that balance and obtained judgment in the sum of RM255,000 in the Court of the first instance. The counter-claim of the appellants was dismissed. On appeal the issue of illegality was submitted for the first time. It was contended

that the agreement of 12 December 1968 was an assignment of the rights under the licence in contravention of an express condition therein and therefore illegal.

There was no dispute on the existence of a provision in the licence stipulating its non-transferability. Such provision was inserted pursuant to the Forest Rules of 1954. But that Rules was subsequently replaced by the said Enactment. Nevertheless the then Federal Court ruled that the applicable law should be the said Enactment being the existing law when the action was commenced. Hence, s. 24(6) of the said Enactment was considered in depth.

His Lordship, Ismail Khan CJ (Borneo) in delivering the judgment of the Court accepted the finding of the trial Court, there being no appeal on it, that the agreement of 12 December 1968 was for "the take over of the whole camp, i.e. lock, stock and barrel." And that being the case his Lordship proceeded to say this, at p. 164:

> It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

Further down, his Lordship after examining s. 24(6) of the said Enactment said this:

> The words "personal to the holder and shall not be transferable in any manner whatsoever" are wide enough to include any form of assignment however disguised.

His Lordship therefore came to the conclusion that the agreement of 12 December 1968 was clearly in breach of the provisions of ss. 23(a), 24(1) and (6) of the said Enactment and thus illegal. Any claim based thereon would not be enforced. Now, s. 23(a) prohibits certain acts in any state land unless authorised while s. 24(1) provides power to the Director of the Forestry Department or his authorised representative to issue licence to do those acts prohibited by ss. 20 and 23 thereof.

In dealing with one particular argument of the respondents his Lordship stated thus, at p. 165:

> It was not suggested by the appellants that there was a "transfer of the licence" under the first and second deeds and A.1(4). What was attacked was the assignment in breach of the Forest Enactment 1968 of the rights under the licence to the appellants by the respondents as agents for the licensees under the agreement. The clause therein providing for the payment of a sum of RM175 an acre to the licensees and RM75 an acre to the Jesselton Development Company far from assisting the respondents is fatal to their case, as it constitutes one of the promises for the assignment of the rights under the licence to the appellants.

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> The power of attorney given to the appellants A.1(4) was a colourable device to deceive others, particularly the Forest Department into believing that the appellants were operating as agents for the licensees.

Another case which dealt with s. 24 (6) is the *Sundang Timber Co. Sdn. Bhd. v. Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200. In summary, b the facts are as follows:

> Sundang Timber Co. Sdn. Bhd., the appellants were granted on 1 February 1964 a special licence by the State Government of Sabah to extract timber in the area of Lamag, Sandakan. The area covered was over 33 square miles. The special licence was deemed to commence from 1 January 1963 and expired c on 31 December 1972. There were also certain conditions in the special licence.
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> On 23 January 1963 the appellants and Kinabatangan Development Co. Sdn. Bhd., the respondents, entered into an agreement. That was before the actual date of issuance of the special licence. However, on 26 March 1964 the parties entered into an irrevocable agency agreement replacing the earlier one on the d extraction and sale of timber pursuant to the said special licence. Also on 26 March 1964 the appellants gave the respondents a power of attorney irrevocable for a period of 10 years to operate and manage the appellants' business. All the working capital came from the respondents.
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> On 18 November 1972 the appellants sued the respondents for the sum of e RM3,055,734.82 based on the statement of account supplied by the respondents. The respondents contested the action pleading several defences, *inter alia*, that the account was rendered in consequence of an illegal transaction. The learned trial Judge ruled that the agreement read with the power of attorney was in breach of the provisions of the said Enactment and was therefore illegal and f any claim based on it was unenforceable.
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> On appeal to the then Federal Court, the issue of illegality was focused upon. His Lordship Lee Hun Hoe CJ (Borneo) in delivering the judgment of the Court made the following observations:
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> (i) that interpretation of an agreement between parties is a matter for the g Court;
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> (ii) that although the special licence was issued under an Ordinance which was subsequently repealed, due to the saving provision, the said special licence was deemed to have been issued under the said Enactment; and
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> h (iii) that the agreement and the power of attorney must be read together as they were inter-related.
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> And in dismissing the appeal his Lordship said this: at p. 202:

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> Just as the financial arrangements for the payment to the licensees is fatal in *Lo Su Tsoon's* case, so also is such financial arrangement between appellants and respondents fatal to appellants' claim as it is a part of the consideration for the assignment to respondents of their rights under the special licence. One of the main reasons for the arrangements under the cover of the two documents is to ensure that respondents have complete control of the business aspects of the two companies and that they would be able to recoup their investments plus substantial profits for both parties. Another reason is to deceive others into believing that respondents were agents when in actual fact all rights have been assigned to them. In other words respondents had stepped into appellants' shoes by acquiring all the rights under the special licence for all purposes.

Further down the judgment, at p. 203, his Lordship continued:

> In the case under appeal the agreement and the power of attorney must be read together as they are interrelated. By these two documents appellants had unreservedly assigned all their rights in the special licence to respondents. The appellants had nothing more to do with the licence but was merely sitting back to collect his dues as agreed for parting with their rights under the licence. They had parted with all their interests in the licence for financial consideration. In effect, they had transferred their rights in the licence to appellants. In my view the agreement is clearly illegal, being in breach of s. 24(6) of the Enactment. Consequently, any claim based thereon cannot succeed as it would be tainted with illegality. The power of attorney is necessary if respondents were to deal with others in such timber business, particularly with the Forest Department. As Ismail Khan CJ remarked in *Lo Su Tsoon's* case ([1971] 2 MLJ 161) the power of attorney was merely "a colourable device to deceive others, particularly the Forest Department into believing that appellants (in our case respondents) were operating as agents for the licensees.

It is to be noted that in both of the cases referred hereinabove the Court looked at the actual effects of the arrangement arising from the agreements and the power of attorney given. In other words the intention of those documents had a vital role to play in determining their legal positions.

The preceding two cases were followed by yet another case involving s. 24(6) of the said Enactment. In *Nam Seng Co. v. Wing Yew (Tawau) Co. Sdn. Bhd.* [1978] 2 MLJ 198 the facts are as follows:

> Syarikat Perjuangan Sdn. Bhd. (1st defendants) were granted a timber licence by the Sabah Government on 1 November 1971 covering an area of 20,000 acres in the Bogaya Forest Reserve, Sandakan.

On 10 April 1972 the 1st defendants executed three documents. The first was a power of attorney in favour of Datuk Cheng Hwee Ming, the 1st plaintiff. The document empowered the 1st plaintiff to do certain acts and things on behalf of the 1st defendants under the timber licence. The second document was a timber extraction agreement where the 1st defendants employed Nam Seng Co. Sdn. Bhd., the second plaintiff, to extract all merchantable timber from the licensed area. And the third was the timber sale agreement between the 1st defendants and Nam Seng Co., the 3rd plaintiff whereby the 1st defendants agreed to sell to the 3rd plaintiff all merchantable timber extracted from the licensed area.

The three plaintiffs were connected in that the 1st plaintiff was the managing director and the sole proprietor of the 2nd and 3rd plaintiffs respectively.

Such arrangements between the 1st defendants and the plaintiffs proceeded until 1975. On 30 August 1975 the 1st defendants executed another power of attorney in favour of Wing Yew (Tawau) Co. Sdn. Bhd., the 3rd defendants/respondents. The 1st defendants also entered into a new timber extraction agreement with Wing Yew (Sandakan) Co. Sdn. Bhd., the 2nd defendants. And on 9 September 1975 the 1st defendants executed a timber sale agreement with the 3rd defendants/respondent.

Arising from the transactions of the 1st defendants with the other defendants, the plaintiffs commenced action against all of them. But the 3rd defendants took out an application to strike out the action against them on the grounds, *inter alia*, of illegality. The application was successful before the Judge at first instance. The plaintiffs appealed.

The then Federal Court dismissed the appeal. His Lordship Lee Hun Hoe CJ (Borneo) ruled that a Licence in Form I issued under s. 24(1) of the said Enactment could not be transferred in any manner whatsoever in view of s. 24(6) of the same. And such a view found support from another member of the panel, namely, his Lordship Chang Min Tat FCJ who said this: at p. 201,

> Such a licence is absolutely not transferable. Sub-section (6) of s. 24 is in these absolute term:
>
> (6) A licence shall be personal to the holder thereof and shall not be transferable in any manner whatsoever and shall cease to be valid on the death of such holder ...

This Court has already held that any purported appointment of an attorney to work the forests in the name of the licensee was a colourable device which was in breach of s. 23 (which prohibits the acts listed in s. 20, *supra*, but in reference to State land other than a forest reserve) and s. 24 and illegal and any claim based thereof could not be enforced: *Lo Su Tsoon Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161. With respect, I would hold the same view with regard to a breach of ss. 20 and 24 in regard to a forest reserve.

From my reading of the judgments in the above three cases the following deductions may be made:

(a) that before determining the legal status of such a transaction, the contents of the documents need to be scrutinised carefully to find the real effects on the parties;

(b) that the actual date of issuance of a timber licence is quite irrelevant in determining the legal status of such a transaction; and

(c) that allocating the various activities in the licensed area to several parties made no difference where the cumulative effect of the documents was the parting away of the interests or rights of a licensee under a timber licence issued.

(b) The Evidence, Contentions and Findings

In the present case, as shown from the facts, the Defendants executed the Timber Sales Agreement and also gave the Power of Attorney to the plaintiffs. Meanwhile, they also signed the Timber Extraction Agreement with Inwill Resources Sdn. Bhd. ('Inwill'). The link between the plaintiffs and Inwill was Han Ah Wah, being the common director and a signatory to both the Timber Sales Agreement and the Timber Extraction Agreement.

Learned Counsel for the plaintiffs submitted that his client was only interested in buying the extracted merchantable timber from the defendants. That of course was an echo of what PW1, Mr. Lo Chee Kiu, had said in evidence. PW1 even went to the extent of saying that he knew of the unfavourable consequence if he had a sales agreement, an extraction agreement and a power of attorney together. Obviously he was not a novice in the timber business.

Hence, with respect, I cannot agree with the submission of the learned Counsel for the plaintiffs. I think the contents and effects of the Timber Sales Agreement (AB1-2) and the Power of Attorney (AB1-1) dispel such a notion.

The Timber Sales Agreement provides, *inter alia,:*

Clause 1

In consideration of the sum of Ringgit Malaysia Eighty Five Thousand (RM85,000) only payable to the sellers and of the terms and conditions and stipulations appearing hereinafter, the sellers hereby agree to sell the merchantable timber extracted from the said land to the buyers and the buyers hereby agree to purchase the same from the sellers.

Clause 2

All royalties, nett proceeds, silviculture and standing timber cess on the said merchantable timber logs sold and all delivery fees, transport costs and extraction fees shall be borne and paid by the buyers.

Clause 5

The buyers shall at their own costs and expenses process and apply to the Government for all or any removal passes and/or transit permits for all timber logs extracted therefrom.

Clause 7

The buyers shall bear and pay all costs and fees for the survey of the said land.

Clause 9

The buyers shall deposit with the Forest Department any required sum or sums of money on behalf of and in the name of the sellers, such deposited sum or sums shall be refunded to the buyers upon completion of extraction of all merchantable timber from the said Land and upon release by the Forest Department.

Clause 10

The buyers shall bear all costs for the construction of kampung houses in compliance with the approval directions by the Hasil Bumi and/or the Forestry Department.

Meanwhile, the Power of Attorney gave the plaintiffs all-encompassing powers which included the powers to make the final selection of the licensed area including its survey, to apply for permits, passes and other authorities, to pay for royalties and other charges, to pay deposit to the Forests Department, to deal with the Government Authority in relation to the licensed area, to institute and defend judicial proceedings, to accept refund of advance excess money deposited with the Forests Department and even to appoint substitutes.

Inspite of the terms therein learned Counsel for the plaintiffs argued that the Power of Attorney had been revoked thereby leaving only the Timber Sales agreement upon which this present action was founded. And it was also the testimony of PW1 that he only wanted the Timber Sales Agreement and not the Power of Attorney. He blamed the 1st defendant for the preparation of the latter. However, PW3, Mr. Denis Rantau, said otherwise. He testified that both PW1 and the 1st Defendant gave the instruction. According to PW3 both even took time before giving the final instruction.

Having considered the evidence of PW1 and PW3 on the preparation of the two documents, I am inclined to believe PW3. This witness had no reason to hide the truth whereas PW1, from my observation, was too eager to paint an innocent picture of himself and of the plaintiffs. And having seen both PW1 and the 1st defendant in the witness box I cannot believe that it was the 1st defendant who had more knowledge of the timber business as portrayed by PW1. My impression of the 1st defendant is that he is a person ever willing to follow any suggestion so long as he is rewarded though it may be pittance. Hence, it is my finding that PW1 and the plaintiffs were very well aware of the contents and the implications of the Timber Sales Agreement as well as the Power of Attorney.

As regards the purported revocation of the Power of Attorney there was no document of revocation being produced by PW1 or the plaintiffs. It was only the words of PW1. But I found this witness to be quite deceptive. For instance, he claimed that the 1st defendant gave him a statutory declaration after revoking the Power of Attorney. And according to him the statutory declaration contained the solemn declaration of the 1st defendant that he would only sell the timber to PW1. But the actual contents of the statutory declaration (AB2-24) reinforced the Power of Attorney, the Timber Sales Agreement and the Timber Extraction Agreement. I think the statutory declaration was intended more to pin down the 1st defendant with a threat of perjury in the event of a breach of any of the provisions therein. Yet PW1 even disclaimed knowing the source of that document which was blatantly in favour of the plaintiffs. And he expected this Court to accept wholesale what he had testified. It is therefore my finding that in the absence of any evidence to the contrary, the Power of Attorney had not been revoked. I also find support to my finding from the contents of the Timber Sales Agreement itself. It is not a plain buying and selling situation between the parties. The plaintiffs have also other obligations to meet such as those stipulated in cll. 5, 7, 9 and 10. These obligations presuppose the plaintiffs to have been duly authorised to act on behalf of the defendants. Thus the plaintiffs could not have allowed the defendants to unilaterally revoke the Power of Attorney without amending the terms of the Timber Sales Agreement. Otherwise the plaintiffs would run the risk of being in breach of the terms therein although not through their own fault. Alternatively, they might comply such term as the payment of deposit to the Forests Department but in so doing they would have no assurance that they would get the refund later on.

Further, I tend to believe the 1st defendant in his evidence that the statutory declaration was prepared in the office of PW1. I am fortified in my belief by the fact that the 1st defendant even asked for an advance from PW1 after executing the statutory declaration, an act contrary to the claim of PW1 that the 1st defendant did it voluntarily.

Anyway, even if the Power of Attorney was indeed revoked, it should not alter the legal position of the transaction between the plaintiffs and the defendants. The crucial period is at the time of its conclusion. In *Nam Seng Co.'s case (supra)* the power of attorney had already been revoked when the action was commenced. Yet the trial Court as well as the then Federal Court considered the status of the transaction at the time when it was concluded in relation to s. 24(6) of the said Enactment. And that must be so as any illegality would have the effect of making the transaction void *ab initio*. Further, I do not think that illegality in a contract can be rectified subsequently when such illegality relates to the formation of the contract. (See: Chitty on *Contracts* Vol. 1 - 26th Edn., paras. 1135-36). After all, due to the illegality, such a contract is void *ab initio*. (See: *Kuju Collieries v. Jharkhand Mines* [1974] AIR SC 1892 which was referred to in *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd.* [1980] 1 MLJ 21).

As it is my finding that both the Timber Sales Agreement and the Power of Attorney were subsisting, the obvious question is: what were their effects and implications as between the plaintiffs and the defendants? Upon reading the contents of both the documents the irresistible conclusion is that upon their execution the defendants had nothing more to do with the said timber licence but to merely sit back to collect the balance of their dues as agreed for parting with their rights there-under. They had parted with all their interests in the said timber licence for financial consideration. (See: S*undang Timber Co. Sdn. Bhd. (supra))*. And that should make the arrangement illegal being in contravention of s. 24(6) of the said Enactment. Hence, any claim based thereon cannot succeed by reason of illegality. It is obvious that in this case the proviso of what is generally known as the Bowmakers' rule is quite relevant, i.e. a claimant's claim is unenforceable when he has either to found his claim on an illegal transaction or to plead its illegality in order to support his claim. (See: *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1944] 2 All ER 579). This is not a case of where the plaintiffs are not relying on an impugned document tainted with illegality to lay their claim. (See: *Mistry Amar Singh v. Kulubya* [1963] 3 All ER 499; *Tinsley v. Milligan* [1993] 3 All ER 65; *Sajan Singh v. Sardara Ali* [1960] 1 All ER 269 PC). This present case is an action which is founded upon an illegal contract. It is brought to enforce that contract. The plaintiffs deny illegality but my finding is otherwise. The proved facts and circumstances led to an irresistible conclusion that there was a clear intended assignment, though executory on certain matters to be performed by the plaintiffs, of the defendants' rights under the said timber licence. And contrary to the submissions of learned Counsel for the plaintiffs I do not find this present case distinguisable from the decided cases referred to hereinabove. Further, it is also my view that subsequent events arising from the transaction

between the parties should not alter its illegal nature simply because such a contract is void *ab initio*. Accordingly I should dismiss this action.

But before doing so I wish to deal with the other contentions of the learned Counsel for the plaintiffs in his vigorous attempt to distinguish this present case from the previous ones. Learned Counsel seemed to imply from his submissions that it should be a pre-condition that the powers in the Power of Attorney had been exercised before the issue of illegality could arise. With respect, I do not think such a requirement was laid down by the then Federal Court in the three previous cases. Indeed in the case of *Lo Su Tsoon Timber Depot (supra)* there was nothing to indicate that any of the powers in the power of attorney had been exercised. To my mind it is the effects of the document or documents on the contracting parties that should be considered. And that seems also to be in the mind of his Lordship Ismail Khan CJ (Borneo) when he said this:

> It is therefore clear from the agreement and the power of attorney that the respondents had assigned all their rights in the licence to the appellants and in so doing had parted with the whole of their interest in the licence. In other words, they had in effect transferred their rights in the licence to the appellants.

(See: *Lo Su Tsoon Timber Depot (supra)* at p. 164).

It was also emphasised by learned Counsel for the plaintiffs that the extraction of timber in the said timber land would be carried out by another company which the plaintiffs had nothing to do. PW1 testified that he managed the plaintiffs entirely on his own. Unfortunately, the presence of PW2, Mr. Han Ah Wah in both the plaintiffs and Inwill only goes to fortify my lingering impression that these two entities must be connected one way or another. Otherwise there was no reason to include Inwill in the statutory declaration of the 1st defendant which I found to have been done in PW1's office. Moreover, I do not think there was much importance attached to the Timber Extraction Agreement by the parties therein as even the extraction cost was not inserted although the same was supposed to have been duly executed. That is another indication that after the defendants had signed the documents all matters would have to come under the control of the plaintiffs and Inwill. Otherwise Inwill would have insisted on the cost to be stipulated so as to ensure that there would be no dispute later on. And surely the defendants would want to know their financial obligation towards the extraction contractor. But that document does not help the parties. Hence, the emphasis by the learned Counsel had no merit.

(ii) Whether s. 66 of the Contracts Act 1950 Applies

This issue has not been pleaded nor submitted by the plaintiffs. And I think rightly so. The evidence of PW1 did not help at all as he seemed to know the legal consequence in the event of any transfer or assignment of the said timber licence. And that should explain why only the Timber Sales Agreement was pleaded as the basis of the claim of the plaintiffs. As such there is no question of the contract being discovered or becoming void, the prerequisites to the application of s. 66 of the Contracts Act 1950. (See: *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91; *Ahmad bin Udoh & Anor. v. Ng Aik Chong* [1970] 1 MLJ 82).

Hence, the said section has no application in the present case.

Conclusion

By reason of illegality of the transaction as discussed above this action must therefore be dismissed. As such it is not necessary for me to consider the other grounds submitted by the learned Counsel for the defendants. There is also no need for me to address the other questions posed at the beginning of this judgment.

I sympathise with the plaintiffs due to the monetary loss by way of advances to the defendants. But from the testimony of PW1 I think the plaintiffs entered the deal wide-awake. Thus, the blame should be entirely on them.

Finally, in view of my conclusion I make no order as to costs.

Reported by Ling Hea Hoon